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November 12, 2007

**VIA ECFS**

Marlene H. Dortch  
 Secretary  
 Federal Communications Commission  
 445 12<sup>th</sup> Street, SW, Portals  
 Washington, DC 20554

**Re: Ex Parte, WC Docket No. 04-223**

Dear Secretary Dortch:

McLeodUSA Telecommunications Services, Inc. ("McLeodUSA"), through undersigned counsel, submits this letter pursuant to 47 C.F.R. § 1.1206(b)(1) to respond briefly to several points in the reply comments filed by Qwest Corporation ("Qwest") and Verizon regarding McLeodUSA's Petition for Modification of the Commission's *Omaha Forbearance Order*.<sup>1</sup> As shown below, these filings provide further reason for the Commission to grant McLeodUSA's Petition and reinstate Qwest's Section 251(c)(3) unbundling obligations due to Qwest's failure to make reasonable wholesale offerings of DS0, DS1 and DS3 loops and transport in the affected wire centers consistent with the Commission's "predictive judgment."

**1. The Commission Must Correct Its Unrealized "Predictive Judgment"**

Both Qwest and Verizon claim that the Commission is not empowered to grant the relief sought by McLeodUSA. Qwest argues that "Section 10 does not grant the Commission jurisdiction to continually reevaluate its forbearance grants."<sup>2</sup> The companies are united in their view that the Commission may not reinstate Qwest's unbundling obligations in the context of revisiting its unrealized predictive judgment, but could instead modify the ruling only after initiating (and completing) an entirely new proceeding that reinvents the wheel by establishing that Qwest UNE regulation is warranted.<sup>3</sup>

<sup>1</sup> *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Memorandum Opinion and Order, 20 FCC Rcd 19415, ¶¶ 79, 83 (2005) ("*Omaha Forbearance Order*") petitions for review denied in part, dismissed in part, *Qwest Corp. v. FCC & USA*, 482 F.3d 471 (D.C. Cir. 2007).

<sup>2</sup> Qwest Reply at 2.

<sup>3</sup> See Qwest Reply at 4 ("The Commission cannot re-regulate Qwest in Omaha without first initiating a new proceeding and compiling a new record that would justify

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Qwest and Verizon misunderstand the nature of McLeodUSA's Petition, and their diversionary tactics are unfounded. In making the Section 10(a)(3) public interest determination that was necessary to justify forbearance from the requirements of Section 251(c), the Commission specifically stated:

We predict that Qwest's market incentives will prompt it to make its network available - at competitive rates and terms - for use in conjunction with competitors' own services and facilities. We will monitor the accuracy of this prediction in the wake of our decision; in the event it proves too optimistic, we will take appropriate action.... To the extent our predictive judgment proves incorrect, carriers can file appropriate petitions with the Commission and the Commission has the option of reconsidering this forbearance ruling.<sup>4</sup>

McLeodUSA's Petition merely asks the Commission to act in manner consistent with its ruling by following through on its promise to monitor Qwest's wholesale market behavior in the wake of the *Omaha Forbearance Order*, and, if it found that its predictive judgment was in error, to take corrective action. The Commission need not address, in this docket, the full scope of its power to revise forbearance orders, because in this case the Commission made the grant of forbearance expressly contingent on Qwest's subsequent offering of reasonable terms for access to its facilities, including its continuing Section 271 obligations, from which the Commission did not grant forbearance.

The Commission plainly anticipated that reimposing regulations might be necessary should Qwest fail to meet the Commission's expectation that it would make just and reasonable post-forbearance offerings, and that is precisely what has occurred. Neither duplication of the existing record nor the convening of a new proceeding is necessary for the Commission to consider the propriety of McLeodUSA's request. McLeodUSA asks only that the Commission adhere to its promise to examine Qwest's post-forbearance actions, and the sole issue at this juncture is whether Qwest's post-forbearance offerings have been just, reasonable, and consistent with the Commission's predictive judgment. Qwest and Verizon's unfounded attempts to sidetrack this expressly

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regulation"); Verizon Reply at 9 ("The Commission could not reverse its forbearance decision without considering all of that evidence - updated to reflect current data - along with all other evidence relevant to the forbearance criteria, as applied in the context of UNE requirements"). Although Qwest points out that the thirty-day time limit on petitions for reconsideration has expired, Qwest Reply at 2, it does not even attempt to advance any illogical claim that it fulfilled (or could have fulfilled) the Commission's predictive judgment within thirty days following release of the *Omaha Forbearance Order*. Indeed, the record in this proceeding shows that Qwest did not even respond substantively to McLeodUSA's inquiries regarding commercial terms until October 2006.

<sup>4</sup> *Omaha Forbearance Order*, ¶83.

contemplated re-examination of the accuracy of the Commission's predictive judgment should be rejected.

In light of this explicit contingency, Verizon's claim that the Commission "merely took 'comfort'" from the predictive judgment "and made clear that its decision to forbear from § 251(c)(3) requirements was justified based solely on the extent of facilities-based competition"<sup>5</sup> is wishful thinking. Although Verizon asserts that "the Commission's decision to forbear did not depend on that predictive judgment," and therefore "claims about that prediction cannot provide a basis for reversing the Commission's decision,"<sup>6</sup> these arguments ignore the plain and simple language of ¶ 83 quoted above. The predictive judgment was not simply incidental, or superfluous, but was expressly made a fundamental underpinning of the Commission's grant of forbearance, and its failure to materialize must now be remedied.

Insisting that the Commission may not evaluate whether the predictive judgment has proven correct, both Qwest and Verizon rely on a corollary argument that McLeodUSA's request lacks merit because competition in Omaha is robust. Qwest's filing touts "substantial – and increasing – facilities-based competition in Omaha, particularly from Cox,"<sup>7</sup> while Verizon enthuses that competition has grown since the Commission granted forbearance.<sup>8</sup> Although McLeodUSA does not agree with Qwest and Verizon's statements,<sup>9</sup> the degree of competition in Omaha is not before the Commission at this time. The question raised in McLeodUSA's Petition, and the *only* issue before the Commission at this juncture, is whether Qwest's post-forbearance actions comport with the predictive judgment that Qwest's wholesale offerings would be just and reasonable once freed from the constraints of Section 251(c) regulation. Qwest and Verizon's pointed avoidance of this issue, and their elaborate attempts to reframe the inquiry as one involving the state of competition in Omaha, which in turn allegedly

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<sup>5</sup> Verizon Reply at 9.

<sup>6</sup> *Id.* at 9.

<sup>7</sup> Qwest Reply at 4. *See* Qwest Opposition at 1 ("Qwest faces intense competition in Omaha").

<sup>8</sup> Verizon Reply at 2.

<sup>9</sup> For example, the Nebraska Public Service Commission's most recent Annual Report on Telecommunications shows that facilities-based CLECs in that state reported a decline in both business and residential access lines between 2005 and 2006, which is the most recent data available.

*See* <http://www.psc.state.ne.us/home/NPSC/communication/AnnualReport2007.pdf>, Part 1, pp. 1-2. On information and belief, the only facilities-based CLECs (*i.e.*, CLECs that use their own local switching) in the Omaha market other than McLeodUSA are Cox, Level 3 (which reports no access lines), Pinpoint Communications, Inc. (which reports no access lines), TCG/AT&T, and Windstream. McLeodUSA's records show that it has only ported lines to Cox, TCG, and Qwest switches. This information indicates that claims of flourishing competition in Omaha, including claims of increased post-forbearance competition, are greatly exaggerated.

requires the Commission to undertake the enormous task of compiling an entirely new record for ruling on McLeodUSA's Petition, should be recognized (and easily dismissed) as a red herring. Such claims should not hinder the Commission's evaluation of whether Qwest's actions are consistent with the predictive judgment, which is all that McLeodUSA's Petition requests and all that the original order specified was necessary to justify a reexamination of the forbearance grant.<sup>10</sup>

Verizon's claim that the Commission already considered and rejected the relief sought by McLeodUSA<sup>11</sup> is likewise unpersuasive. McLeodUSA reiterates (as it has made clear since filing the Petition) that its request is strictly confined to seeking Commission determination of whether Qwest's post-forbearance offerings comply with the predictive judgment. The procedural history following release of *Omaha Forbearance Order*, which both companies cite,<sup>12</sup> cannot even arguably be interpreted as having addressed this issue, and neither company tries to make such a contention. This is the first and only time the Commission has been asked to assess whether Qwest's actions meet the Commission's expectations, and it must evaluate that issue before McLeodUSA is forced to exit the Omaha market.

## 2. Cost-Based Pricing Promotes Facilities-Based Competition

Both Qwest and Verizon invoke their rote objections to TELRIC pricing, which are by now familiar to the Commission. Qwest claims that "TELRIC rates are inconsistent with developing true facilities-based competition" and equates TELRIC with price

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<sup>10</sup> Although the degree of competition in Omaha is irrelevant to the issue presented in the Petition, the absence of any factual evidence to support Qwest's or Verizon's claims about allegedly robust competition is striking. Qwest's prior submissions contain little specific information about any potential competitor other than Cox. However, Cox does not have facilities reaching the vast majority of McLeodUSA's customer locations, and it offers no solution to replace lost DS0 loops in the affected wire centers. See McLeodUSA Reply to Opposition at 3. Further, the GeoResults study obtained by McLeodUSA shows that cable companies have connections to only a tiny fraction of commercial buildings in Omaha, which reveals Qwest's claim about allegedly flourishing cable competition to be nothing more than smoke and mirrors, at least in the business market. Even if Cox were a viable alternative provider, which is not the case, the Commission has recognized that an ILEC/cable duopoly does not suffice to meet the local competition goals of the 1996 Telecommunications Act. See *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, ¶ 55 (1999) ("*UNE Remand Order*").

<sup>11</sup> See Verizon Reply at 2 (stating that McLeodUSA's "claims here essentially reduce to the same claim it made in 2005: because McLeod [sic] has adopted a business plan that depends on TELRIC-priced UNEs, the Commission must retain § 251(c)(3) unbundling no matter what the state of facilities-based competition. The Commission explicitly rejected that claim in 2005 and should reject it again now").

<sup>12</sup> See Verizon Reply at 2; Qwest Reply at 2.

caps,<sup>13</sup> while Verizon posits that “TELRIC pricing does not apply to 271 elements.”<sup>14</sup> Not surprisingly, neither Qwest nor Verizon cites the United States Supreme Court decision that specifically rejected that same contention that TELRIC pricing discourages efficient investment.<sup>15</sup> Furthermore, neither company attempts to reconcile the patent inconsistency between their claims that TELRIC pricing undermines facilities-based competition and their pending forbearance petitions, all of which are premised on the alleged existence of robust competition resulting from new entrants’ enormous investment in facilities-based competition.

### 3. Special Access Offerings Do Not Meet the Predictive Judgment

Qwest fares no better in defending its post-forbearance DS1 and DS3 offerings. It openly admits that its proposed DS1 and DS3 prices are nothing more than tariffed special access rates, stating that “there is no requirement that Qwest offer new DS1/DS3 products priced differently than its currently tariffed services.”<sup>16</sup> In other words, it is unquestionable that Qwest has been unwilling to offer McLeodUSA any pricing other than its tariffed special access rates as its commercial or 271 network element pricing for DS1 and DS3 loops and transport, consistent with what McLeodUSA stated in its Petition. Thus, despite Qwest’s recent claims that it has negotiated DS1/DS3 rates in good faith, the bottom line is that Qwest was never willing to change its position that McLeodUSA had to purchase special access services after forbearance was granted.

Of course, the fact that Qwest’s special access offerings were in existence at the time the Commission issued the *Omaha Forbearance Order* renders Qwest’s argument nonsensical. It is unfathomable that Commission would resort to reliance on a “predictive judgment” that Qwest would offer reasonable prices on a commercial basis if all the Commission meant was that Qwest had to offer McLeodUSA special access services. Qwest was already obligated to offer those services to competitors in Omaha. The Commission unquestionably distinguished 271 loop and transport offerings from special access in the *Omaha Forbearance Order* itself:

To begin with, we note that withdrawal of these loop and transport offerings [DS0-, DS1-, DS3-capacity facilities] would be impermissible under section 271, which requires Qwest to make loop and transport facilities (among others) to competitors at just and reasonable rates and terms. ***In addition***, Qwest offers ***similar*** special access services pursuant to tariffing or contract filing

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<sup>13</sup> Qwest Reply at 1.

<sup>14</sup> Verizon Reply at 8.

<sup>15</sup> *Verizon Communications v. FCC*, 535 U.S. 467 (2002).

<sup>16</sup> Qwest Reply at 6.

requirements, and cannot cease offering such services to customers without authority under section 214.<sup>17</sup>

This language is plainly inconsistent with any argument that the Commission believed that special access services *were* 271 network elements. And the Commission's predictive judgment was that market forces would compel Qwest to offer commercial pricing for loops and transport at rates that were materially less than Qwest's tariffed special access pricing to address the legitimate concern that Qwest would not use forbearance to price squeeze facilities-based competitors out of the Omaha market. It is equally clear that Qwest did not get that message.

Moreover, because Qwest's special access rates vastly exceed forward-looking pricing as measured by TELRIC, which reflects a competitive marketplace,<sup>18</sup> this concession proves McLeodUSA's point that Qwest's offerings are unreasonable and that Commission intervention is necessary to curtail the Omaha market exit of competitors faced with infeasible choices for UNE replacement arrangements in the affected wire centers.

McLeodUSA's previous submissions demonstrate that special access pricing is neither reasonable nor acceptable for purposes of satisfying Qwest's Section 271 obligations, which the Commission declined to modify (despite Qwest's forbearance request) in the *Omaha Forbearance Order*.<sup>19</sup> The unreasonable nature of Qwest's DS1/DS3 offering is compounded by the anticompetitive terms and conditions embodied in its Regional Commitment Plan ("RCP"), which Qwest addresses by stating that "the RCP only requires McLeod to maintain 90 percent of its special access volume with Qwest."<sup>20</sup> As McLeodUSA seeks UNE replacement arrangements in the nine wire centers affected by the *Omaha Forbearance Order* but not throughout Qwest's 14-state footprint, this statement plainly illustrates how unreasonable Qwest's proposal is. Because the discounted pricing that Qwest offers is based on a region-wide commitment, not just on purchases in the nine Omaha wire centers, Qwest seeks to compel McLeodUSA to reduce its UNE usage while simultaneously increasing its special access usage, even in areas where UNEs would generally otherwise be available. This shows that the evaporation of Qwest's UNE obligations has resulted in the loss of any incentive to negotiate reasonable DS1/DS3 replacement arrangements while Qwest holds McLeodUSA hostage, safe in the knowledge that McLeodUSA has no choice but to rely on Qwest for access to last-mile bottleneck facilities.

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<sup>17</sup> *Omaha Forbearance Order*, ¶ 80 (emphasis added).

<sup>18</sup> See McLeodUSA Reply at 20.

<sup>19</sup> See McLeodUSA Petition at 2, 5, 16; McLeodUSA Reply at 18-22. See also *Omaha Forbearance Order*, ¶¶ 96, 103 ("part of the reason we are able to grant Qwest forbearance from section 251(c)(3) unbundling obligations for loops and transport is because a comparable wholesale access obligation exists under section 271(c)").

<sup>20</sup> Qwest Reply at 8 (emphasis added).



#### 4. UNE-P Replacement Commercial Agreements Do Not Translate Into Reasonable Post-Forbearance Agreements

Verizon brazenly champions its own pending forbearance petitions while hailing the commercial agreements it entered into following elimination of the UNE platform as evidence of post-forbearance reasonableness.<sup>21</sup> Qwest has likewise entered into numerous such agreements, and, unlike Verizon, publicizes the names of the signatories on its website.<sup>22</sup> However, the mere existence of QPP commercial agreements is scarcely probative, much less dispositive, of reasonable conduct in a post-forbearance environment, and Qwest's actions here have fallen far short of reasonableness.

The QPP agreements, like Qwest's post-forbearance Omaha offerings, are a one-sided array of unilaterally imposed rates, terms and conditions that starkly reflect the disparate bargaining power between Qwest and its competitors.<sup>23</sup> Although Verizon states that its "actual marketplace experience bears out the Commission's conclusion that carriers have a strong incentive to enter into commercial relationships in order to keep traffic on their network,"<sup>24</sup> competitors actually were forced to choose between signing a commercial UNE-P agreement or immediately exiting the market. The relevant consideration is not how many such agreements were signed under those circumstances, but whether CLECs were able to remain viable in the market using those commercial agreements, and from a consumer standpoint, what happened to retail prices.

For example, the names of QPP signatories, standing alone, do not permit any useful evaluation of the reasonableness of the QPP agreements. Qwest's website contains no information on which companies actually did business with Qwest under the agreements; whether any such business arrangements were minimal or significant; how many (if any) new customers were added since the agreements were signed; and how many of the signatories are even still operating in today's shifting telecommunications landscape. Qwest's Form 477 data show substantial declines in UNE-P lines since the implementation of the *TRRO*<sup>25</sup> in Iowa and Nebraska, the two states affected by the *Omaha Forbearance Order*; see Table 1, below. If CLECs simply used QPP agreements to stem losses in their legacy customer bases, but have stopped marketing and selling services that require

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<sup>21</sup> Verizon Reply at 11.

<sup>22</sup> See <http://www.qwest.com/wholesale/clecs/commercialagreements.html> ("QPP Master Services Agreement" or "QPP agreement").

<sup>23</sup> See McLeodUSA Petition at 15, n. 49 (Because Qwest refused to negotiate substantive changes to template terms for QPP agreements, attributing such agreements to Qwest's reaction to market forces is not an accurate reflection of circumstances that existed when the agreements were entered into).

<sup>24</sup> Verizon Reply at 3.

<sup>25</sup> *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533 (2005) ("*TRRO*"), *aff'd*, *Covad Comm'ns Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

use of the Qwest facilities covered by the agreements, any claims of reasonableness should be accorded little, if any, weight.

**Table 1**

State	UNE-P lines as of June 30, 2004	QPP lines as of June 30, 2006	Percent Change
Iowa	79,178	65,914	-17.86%
Nebraska	47,666	43,653	-8.42%

Source: Qwest Responses to FCC Local Competition Reports, available at <http://www.fcc.gov/wcb/iatd/comp.html>

Although Qwest's website lists 101 companies that signed the agreements, McLeodUSA's review of publicly available information about the companies named by Qwest indicates that the likely number of active agreements is much lower. On information and belief, only 22 of the 101 listed companies are currently certified Iowa CLECs, and only 16 are currently certified Nebraska CLECs. At least nine of the 101 companies have either gone out of business entirely, or cannot be reached via contact information provided to the FCC.<sup>26</sup> An additional 24 companies appear to be operating subsidiaries of the same corporate parent, and so arguably are not independent competitors that should be counted more than once for purposes of determining the number of viable agreements.<sup>27</sup> Further, of the 22 current Iowa CLECs on the list, five companies collected no revenue in 2006, according to the Iowa Utilities Board website, which indicates that they did not utilize the agreements during that time period (at a minimum).<sup>28</sup> The assets

<sup>26</sup> These companies include American Long Distance; American Telco of Iowa; American Telco MN; Automotive Experts Group; J Richards Co.; Minnesota Phone Company Financial Group; National Brands ExpDesign Svcs; Talk America MSA; and Washington Phone Company.

<sup>27</sup> These companies include Budget Phone, Inc. and Budget Phone ND and SD, Comtel Telecom Assets LP, d/b/a Excel, and Comtel Telecom Assets, d/b/a VarTec; DEICA Communications, Inc., and Covad Communications Group Inc.; Global Connection of America, Inc., and Global Connection of Minnesota; Marathon Communications, Inc., and Marathon Communications of WA; National Brands, Inc., and National Brands ExpDesign Svcs; Northstar Telecom, Inc., Northstar Telecom OR, and Northstar Telecom IA/UT; PiperTel Communications, LLC, and PiperTel Communications CO; Trans National Communications International, Inc., Trans National Communications International - MN-MT, and Trans National Communications International - WY; VCI Company and VCI Company - UT; and Z-Tel Communications and Trinsic Communications, Inc.

<sup>28</sup> These companies include CAT Communications International, Inc.; Iloka, Inc.; NextGen Integrated Communications, LLC; Preferred Carrier Services, Inc.; and Vycera Communications, Inc. See 2006 Local Exchange Companies Assessable Revenues and Dual Party Assessable Revenues, available at:



(including customers) of at least two more companies have been sold, indicating that these companies are likely no longer operating under a QPP agreement.<sup>29</sup>

And even though there are CLECs still in existence that have a QPP agreement with Qwest, some are curtailing rather than expanding operations under the QPP due to the uneconomical commercial pricing offered by Qwest. For example, McLeodUSA itself is a signatory to a QPP agreement with Qwest, which was signed on February 1, 2005. At that time, McLeodUSA had more than 114,000 UNE-P access lines serving residential and small business customers served using QPP. That number has declined to 44,000 QPP lines as of October 31, 2007. Moreover, since signing the QPP agreement, McLeodUSA suspended offering service to new customers in markets where it provides service using QPP.

Further, McLeodUSA is in the process of terminating local service to a significant number of residential customers in both Nebraska and Colorado. As explained in its applications filed with the respective state commissions, McLeodUSA has had to cease offering a competitive choice to customers in several wire centers due to the fact that Qwest's commercial pricing under QPP is such that McLeodUSA cannot offer a competitive retail price while recouping the costs charged by Qwest. Below is a sampling showing the price squeeze McLeodUSA faces under QPP when serving residential customers:

**Table 2**

Central Office	QPP Cost	McLeodUSA Rate	Qwest Rate
OLWNIATC	\$33.12	\$34.95	\$21.43
STPLNENW	\$71.93	\$53.95	\$22.96
BLFSCOMA	\$40.85	\$43.75	\$21.88

McLeodUSA's proposed termination of local service in several Nebraska wire centers was recently approved by the Nebraska Public Service Commission, and its similar request is pending before the Colorado Public Utilities Commission.<sup>30</sup>

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[http://www.state.ia.us/government/com/util/industry\\_topics/annual\\_reports/annual\\_report\\_info.html](http://www.state.ia.us/government/com/util/industry_topics/annual_reports/annual_report_info.html).

<sup>29</sup> In 2007, Trinsic Communications, Inc., sold its assets to Matrix Telecom, Inc., and Marathon Communications, Inc., sold its customers and assets to BCN Telecom, Inc.

<sup>30</sup> *In the Matter of the Application of McLeodUSA Telecommunications Services, Inc., Hiawatha, Iowa, Seeking to Cease Providing Residential Services in Certain Qwest Wire Centers*, Opinion and Findings, Ne. PSC Docket No. C-3860 (October 30, 2007); *In The Matter of The Application of McLeodUSA Telecommunications Services, Inc. to Discontinue Residential Services in Certain Wire Centers*, Co. PUC Docket No. 07A-392T.

Even where McLeodUSA has maintained service using the QPP agreement, the cost increases resulting from the commercial pricing offered by Qwest have forced McLeodUSA to annually increase its retail pricing to end user customers. Thus, the significant negative impact to retail consumers estimated by QSI Consulting, Inc. with respect to the pending Verizon UNE forbearance petitions has already been experienced by thousands of consumers in the Qwest region due to the commercial pricing unilaterally set by Qwest in its QPP agreement.

In contrast to the number of QPP agreements is the reality that, as the *Omaha Forbearance Order* nears its two-year anniversary, Qwest has signed only **one** DS0 UNE replacement commercial agreement. This highlights not only the limited scope of UNE-based competition in the Omaha area, but the lack of interest in any new entry into this market. Of course, as was the case with QPP agreements, the actual marketplace activity of signatories of commercial agreements would be far more significant evidence than their mere number; but the fact that there is only one agreement speaks volumes about the likelihood of any real competition occurring through use of these replacement products.

The Commission should reject Qwest and Verizon's incorrect, unsubstantiated, and illogical claims and should grant McLeodUSA's Petition for Modification of the *Omaha Forbearance Order*.

Sincerely,



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cc: William A. Haas, McLeodUSA